L. A. K. asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Sessions' determination that Home Depot did not engage in employment-related retaliation against Ms. K. in violation of the Utah Antidiscrimination Act (Title 34A, Chapter 5, Utah Code Annotated).

The Appeals Board exercises jurisdiction in this matter pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-5-107(11).

BACKGROUND AND ISSUES PRESENTED

On May 24, 2002, Ms. K. filed a complaint with the Utah Antidiscrimination & Labor Division ("UALD") alleging that Home Depot had retaliated against her because she had objected to a manager's discriminatory statements. After investigating Ms. K.'s complaint, UALD found no reasonable cause to believe that Home Depot had engaged in the alleged retaliation.

Ms. K. then requested a formal evidentiary hearing. Judge Sessions held the hearing on March 1, 2005, and then on March 15, 2005, issued his decision concluding Home Depot had not unlawfully retaliated against Ms. K.. Specifically, Judge Sessions found that the actions taken by Home Depot, which Ms. K. alleged to be retaliatory, had been taken **before** Ms. K. objected to the purported discriminatory statements.

In requesting review of Judge Sessions' decision, Ms. K. reiterates her argument that Home Depot took action against her because of her opposition to the alleged discriminatory statements.

FINDINGS OF FACT

The Appeals Board affirms Judge Sessions' findings of fact. The facts relevant to the issues raised by Ms. K.'s motion for review can be summarized as follows.

During the fall of 2001, Home Depot was in the process of staffing its Park City store. Sharon Pind, the store manager, hired Ms. K. in mid-September, 2001, to work in a personnel management position known as an "ADS." However, Ms. Pind was dissatisfied with Ms. K.'s performance and on November 5, 2001, gave Ms. K. a written reprimand.

Also during 2001, Home Depot was in the process of replacing its ADS positions with a new personnel position known as an "HMR." Employees who were performing satisfactorily in the old ADS positions were allowed to interview for the new HRM positions, but ADS employees who were not performing satisfactorily were not permitted to interview for the new positions. In mid-November, 2001, Home Depot management decided not to interview Ms. K. for an HRM position because she had not performed well in the ADS position. Ultimately, another employee with a good work record and better educational and experience qualifications was hired.

For employees such as Ms. K., who did not receive the new HRM positions, Home Depot provided transfers to other positions where they were paid at the rate applicable to the new position. Consequently, depending on the new position, some employees made less than they had as ADS employees while others made the same or more. Ms. K. was transferred to a sales associate position that paid less than her former ADS position.

In late November, 2001, Ms. K. learned that she would not be interviewed for an HRM position and would be moved to a sales associate position. On December 3, 2001, she claimed for the first time that she had observed discriminatory conduct and comments on the part of another Home Depot employee.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-5-106 of the Utah Antidiscrimination Act prohibits an employer from discriminating against an employee who has opposed what the employee believes to be illegal discrimination. Because this provision of Utah law is similar to federal statutes prohibiting retaliation, Utah's appellate courts have found it helpful to follow interpretations of the federal provisions. Viktron/Lika v. Labor Commission, 38 P.3d 993, 995 (Utah App.); Sheikh v. Department of Public Safety, 904 P.2d 1103 (Utah App. 1995); University of Utah v. Industrial Commission, 736 P.2d 630 (Utah 1987). The Appeals Board will therefore consider federal precedent in evaluating Ms. K.'s claim of unlawful retaliation.

In McDonnell Douglas Corp. v. Green, 411 U.S.792 (1973), the United States Supreme Court addressed the parties' burdens of production and the order for presentation of evidence in claims of discrimination that are based on circumstantial evidence. In such cases, the individual alleging discrimination must first establish a prima facie case. The employer must then come forward with a non-discriminatory explanation for its actions. If the employer provides such an explanation, it falls to the trier of fact to decide the ultimate question of whether the employer intentionally discriminated against the employee for an unlawful reason.

Under the foregoing analytical framework, the Appeals Board must first determine whether Ms. K. has established the elements of a prima facie case of unlawful retaliation. In Viktron/Lika v. Labor Commission, 38 P.3d 999, the Utah Court of Appeals identified the elements of a prima facie case of retaliatory discharge as: 1) protected opposition to discrimination; 2) adverse action by the employer subsequent to the protected activity; and 3) a causal connection between the employee's activity and the adverse action. While there is no dispute that Ms. K.'s letter of December 3, 2001, constituted protected opposition to alleged discrimination, thereby satisfying the first element of the prima facie case, Ms. K. has failed to establish either the second or third elements. The alleged adverse action by Home Depot occurred **before** Ms. K. ever engaged in protected activity. Furthermore, there is no persuasive evidence of any causal connection between Ms. K.'s activity and Home Depot's actions.

In light of the foregoing, the Appeals Board agrees with Judge Sessions' conclusion that Home Depot did not retaliate against Ms. K. for her opposition to alleged discriminatory conduct and comments. Consequently, Home Depot did not violate the Utah Antidiscrimination Act in this

matter.

ORDER

The Appeals Board affirms Judge Sessions' decision and denies Ms. K.'s motion for review. It is so ordered.

Dated this 8th day of December, 2005.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch